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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JEHU MATTHEWS,

Defendant and Appellant.

D073301

(Super. Ct. No. SCD265849)

APPEAL from a judgment of the Superior Court of San Diego County, Leo Valentine, Jr., Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found Jehu Matthews guilty of two counts of unlawfully carrying a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a)(1); counts 1 and 4), two counts of unlawful possession of marijuana for sale (Health & Saf. Code, § 11359, subd. (b); counts 3 and 6), and two counts of unlawfully transporting marijuana for sale (Health & Saf. Code, § 11360, subd. (a)(2); counts 2 and 5). With respect to counts 1 and 4 the jury also found true allegations Matthews was not the registered owner of the firearm and the firearm was loaded on each occasion (Pen. Code § 25400, subd. (c)(6)). The court entered an order granting Matthews three years of formal probation on the condition he serve 365 days in county jail, with credit for time served.¹

Matthews's defense centered on his claim that he was operating a medical marijuana collective in accordance with Health and Safety Code section 11362.775. He contends on appeal the prosecutor committed misconduct and violated his constitutional rights when the prosecutor questioned the legitimacy of the collective by asking why Matthews had not called any of the 70 people Matthews said were members of the collective when two individuals, upon advice of counsel, asserted their Fifth Amendment privilege to remain silent. We conclude Matthews forfeited his claim by not timely objecting to the statement, his counsel was not ineffective, and, even if he had preserved

¹ Under Penal Code section 1237, subdivision (a), "an order granting probation is deemed a 'final judgment' for the purpose of taking an appeal." (*People v. Chavez* (2018) 4 Cal.5th 771, 786.)

the issue for appeal, there was no prejudicial misconduct. Therefore, we affirm the judgment.

BACKGROUND

A

A police officer stopped a vehicle Matthews was driving for an expired registration tag on February 23, 2016. When the officer conducted a legal search of Matthews and the vehicle, the officer located cash, an empty plastic bag containing marijuana residue, a bag containing a digital gram scale with numerous small plastic bags containing marijuana, and numerous empty plastic bags. On the floorboard near the passenger seat, the officer found a backpack containing a loaded handgun as well as three large plastic bags containing a large amount of marijuana. The net weight of the marijuana in the bags was more than two pounds.

A notebook found in the vehicle contained a newspaper clipping publishing a fictitious business name statement for an entity called Cannawellness, a letter from the Internal Revenue Service addressed to Cannawellness and Matthews, a fictitious business name statement for Cannawellness filed with the San Diego County Recorder, and a partnership agreement for Cannawellness containing Matthews's name.

Thousands of messages were recovered in a lawful search of a cellphone found in the vehicle, many of which involved the sale of marijuana. None of the messages sought the names of the buyers or evidence of medical marijuana cards. None of the text messages referred to Cannawellness or appeared to vet members for a collective.

B

Several months later, on August 6, 2016, an officer again stopped a vehicle Matthews was driving for failing to stop at a stop sign. In a lawful search of the vehicle, the officer found a large amount of marijuana contained in large and small bags. The officer also found a bag of live ammunition rounds in the center console of the vehicle along with a cloth bag containing a loaded semiautomatic firearm. The gun was not registered to Matthews. The net weight of the marijuana recovered was more than two pounds.

The officer also recovered Matthews's cell phone, which contained many text messages referring to marijuana sales. No messages mentioned Cannawellness. One buyer mentioned his recommendation card was expired and Matthews still agreed to sell to him.

Matthews exchanged text messages with an individual who sent Matthews information regarding a defense to gun and marijuana charges after the February 2016 arrest. The individual suggested Matthews sign paperwork to say he was a super collective. After reviewing the information provided, Matthews wrote, "They are helping but I need a huge patient list." Several messages indicated the individual was compiling a patient list. The individual asked Matthews to sign something for the California Medical Board to check his license. Matthews later sent the individual a message stating, "Bro, I got so many recs yesterday. I took an L on two zips and gave out G's for picts and recs," meaning he took a loss on two ounces by giving out grams of marijuana in exchange for pictures of medical marijuana recommendation cards.

C

A police officer investigated Cannawellness and determined it is not licensed as a legal dispensary in either the County or City of San Diego. Additionally, San Diego has not issued any mobile dispensary licenses. The officer explained the federal government does not issue licenses for marijuana dispensaries.

D

Prior to trial, defense counsel identified four potential witnesses to testify they purchased marijuana from Matthews with medical recommendations. Later, defense counsel advised the court she decided to call only two witnesses. The court questioned whether the witnesses could expose themselves to criminal prosecution if they testified they bought marijuana from Matthews. After consultation with court-appointed counsel, both witnesses asserted the Fifth Amendment privilege to remain silent and were excused.

E

Matthews testified on his own behalf. The parties stipulated a physician recommended Matthews use medical marijuana, which he stated was to relieve symptoms of asthma.

Matthews testified he formed Cannawellness as a collective to help people who use medical marijuana and cannot go to a dispensary or cultivate their own marijuana. He used his car to deliver marijuana. He testified he had a collective of about 70 people in 2016. Matthews said he acted as a managing partner who communicated with the growers and delivered to other members of the collective. He stated he had people

become partners. When someone would seek entrance into the collective by talking to a partner, the partner vetted the person and ensured the person had a medical recommendation card before allowing the person to join. Matthews stated he is a member of various cannabis associations through which he obtains education and advocates for the collective members.

Matthews testified he registered the business name Cannawellness with the San Diego County Recorder in April 2015 and had the name published in a local newspaper in April and May 2015. He also prepared a partnership agreement for Cannawellness. He also obtained an employer identification number for the business from the Internal Revenue Service.

He did not register Cannawellness as a not-for-profit organization, but he claimed he did not make a profit. He did not apply for a license to run a collective or a dispensary.

Matthews testified he asked for an individual's recommendation in a March 2016 text message because he knew the person's medical recommendation had expired. He said he wanted to see the new recommendation "and probably save it for my records." He sold to an individual who said his recommendation was expired because he believed the person would be getting another recommendation and the medical condition itself had not expired.

Matthews stated he felt he needed a gun to protect himself and the marijuana he had in his car. He claimed he obtained the guns from private individuals but did not

know how to register his firearms for use with his business. He believed his car was his place of business.

On cross-examination, Matthews said he received as a gift the gun seized in the February 2016 arrest. He said he bought from a friend the gun seized in the August 2016 arrest. He admitted he was not the registered owner of either weapon, which were both concealed and loaded at the time of each arrest.

Matthews possessed over two pounds of marijuana on each occasion because he intended to sell it to members of his collective. He agreed he had no license to legally sell or deliver marijuana in either the City or County of San Diego. He did not think he needed to register or license the collective based on something he read in "a grand jury decision."

Matthews had no financial records for his business and no patient list. He claimed he confirmed the individuals he sold to were medical marijuana patients when he made the deliveries. He said most members only agreed verbally to participate in the collective. He did not have documentation of medical marijuana cards for members. Matthews claimed the person with whom he exchanged messages about a defense shared the names and medical recommendations of patients because they were both part of the collective.

F

After the close of evidence, the court instructed the jury with CALCRIM No. 3413 regarding the factors to consider in determining if Matthews was operating as part of a medical marijuana collective pursuant to the Medical Marijuana Program Act pursuant to

Health and Safety Code section 11362.775. Those factors include the size of the collective's membership, the level of members' participation in operating and governing the collective, whether the collective was established as a nonprofit organization, the presence or absence of financial records, accountability to collective members, and evidence of profit or loss. The instruction advised the jury the People bore the burden of proving "beyond a reasonable doubt that the defendant was not authorized to plant, cultivate, harvest, transport for sale or possess for sale ... marijuana for medical purposes" and if the People did not meet this burden, the jury must find Matthews not guilty.

G

In closing statements, the prosecutor argued the evidence did not support Matthews's defense that he was operating a legitimate marijuana collective and selling only to collective members who were qualified patients. The prosecutor presented arguments about the factors in the jury instruction. The prosecutor contended the text messages showed no evidence Matthews was selling to qualified patients who were members of a collective. Matthews admitted he sold marijuana to someone without a valid medical marijuana card. The prosecutor argued the language of the messages was more consistent with illicit drug dealing than a legitimate collective of people with medical marijuana cards. The prosecutor pointed out Matthews produced no documentation of the number of qualified patients in the collective or evidence of medical marijuana cards. He argued there was no accounting or financial records to show the volume of purchases or profit or loss from the collective.

Toward the end of the argument, the prosecutor commented: "If there was an actual legit collective here, I would expect for there to be a line of 70 alleged members out the door coming in to testify on the defendant's behalf. If these are in fact medical marijuana patients, they're depending on the defendant for him to deliver the medicine to them. [¶] But they're not here now because there is no legit collective. There is [*sic*] no witnesses to say that they're actual medical marijuana patients and that they were signed up in the collective. They were actually just buyers. They were actually just customers of the defendant, who is their supplier. That's all the evidence shows in this case."

Defense counsel did not object to the prosecutor's closing statement. In her response statement, defense counsel reminded the jury the burden was on the government, not on the defendant. Defense counsel stated, "Decisions that were made by me as a trial attorney do not affect the burden in this case and the presumption of innocence. I chose not to call 70 witnesses in this case. I don't have to. The law does not require it. Do not let them shift the burden onto the defense in this case."

In rebuttal, the prosecutor did not mention a lack of witnesses. Instead, he asked the jury to consider the postarrest text message exchange with the individual about compiling a patient list, which would not be necessary if the collective was legitimate.

DISCUSSION

Matthews contends the prosecutor's statement about calling members of the collective as witnesses was improper because two of those members were legally unavailable after asserting their Fifth Amendment rights. A defendant complaining of prosecutorial misconduct on appeal generally must have preserved the issue by objecting

to the conduct and requesting a curative admonition or risk forfeiture. Failure to object and request an admonition "is excused only when 'an objection would have been futile or an admonition ineffective.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.)

Matthews's counsel did not object to the prosecutor's statement either at the time of the comment or before the jury retired to deliberate. Matthews admits in his reply brief an objection may not have been futile. Notwithstanding the forfeiture, Matthews asks us to review the matter contending his attorney was ineffective in failing to object and there is no satisfactory explanation for the lapse. We disagree.

To establish ineffective assistance of counsel, a defendant has the burden to show counsel's performance fell below the standard of reasonableness under prevailing professional norms and the attorney's deficient performance was prejudicial, i.e., the defendant would have obtained a more favorable result absent the alleged error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-217.)

" 'Failure to object rarely constitutes constitutionally ineffective legal representation' [Citation.] Moreover, '[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' " (*People v. Huggins* (2006) 38 Cal.4th 175, 206 (*Huggins*).)

Matthews has not met his burden of establishing ineffective assistance of counsel. This is not a case where there can be no satisfactory explanation for counsel's decision

not to object. Rather than calling attention to the comment during the prosecutor's statement by objecting, counsel apparently made a tactical decision to focus the jury in her own statement on the People's burden and the fact she chose not to call 70 witnesses because the defense is not required to do so. Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349.) On this record we cannot find the counsel's performance deficient. (*Huggins, supra*, 38 Cal.4th at p. 206.)

In any event, we conclude the prosecutor's remarks did not amount to prejudicial misconduct. "A prosecutor's conduct violates the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's conduct that does not render a criminal trial fundamentally unfair violates California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] [¶] Even when misconduct has been established, 'it "must bear a reasonable possibility of influencing the penalty verdict. [Citations.] In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner." ' [Citation.] At the same time, we bear in mind that prosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.' " (*People v. Ervine* (2009) 47 Cal.4th 745, 805–806.)

A prosecutor may fairly comment upon the failure to introduce logical evidence or call logical witnesses. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215–1216.)

"Comment on a defendant's failure to call a logical witness in no way undercuts the privilege against self-incrimination." (*People v. Ford* (1988) 45 Cal.3d 431, 447.)

"When the defendant has taken the stand ... and offered [a] ... defense in which he identifies other persons who could support his testimony, and those witnesses are available and subject to subpoena, there should be no question but that comment is appropriate and permissible." (*Ibid.*) Matthews chose to testify and stated there were 70 members of his collective. He identified several of his supposed partners in the collective. Although two alleged patients were subpoenaed and chose not to testify after obtaining advice of counsel, the prosecutor's statement was not misleading because he could fairly comment about the absence of other witnesses in the collective such as physicians, growers, or legitimate patients.

Even if the prosecutor's comment could be deemed error, we conclude it was harmless under any standard because there was no reasonable possibility it influenced the verdict given the totality of the evidence in this case. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

DATO, J.